

1 contingent, even if it's contingent.

2 THE COURT: I read Getty a little more
3 narrowly, and at least I read Getty to require --
4 I read Getty, and I'll admit that I've not studied
5 it as thoroughly as I expect to prior to making a
6 decision here, but I read Getty to turn on the
7 fact that the indemnity issue was raised. You're
8 reading it more broadly.

9 MR. ROBERSON: Your Honor, I am
10 definitely reading it more broadly, and I think
11 when the Court studies Getty, studies the Tex.dot
12 case and studies the Team Promotion case, what I
13 think you're going to find is there they did not
14 raise indemnity, they raised other affirmative
15 counts. But let's talk about that for a minute.

16 What I see here is that they raise
17 indemnity.

18 THE COURT: Oh, yeah, I understand.

19 MR. ROBERSON: The compulsory
20 counterclaim issue I think is another reason why
21 relief should be denied here, but upon re-reading,
22 I would suggest to the Court, and I've read Getty
23 a half a dozen times and again before I came in
24 here today, Getty on first reading lead me to the
25 same conclusion that you apparently reached. On

1 re-reading and re-reading, I think what it says
2 is, when you read it together with Ingersol-Rand
3 and these other cases, if you seek any affirmative
4 relief, you then put on the hat of a Plaintiff.
5 Res judicata doctrine says when you're a
6 Plaintiff, you bring all your causes of action if
7 they relate to the same subject matter, and if you
8 don't, you're barred by res judicata from bringing
9 them later.

10 THE COURT: All right.

11 MR. ROBERSON: All right, Your Honor, let
12 me turn to what I think is a very important part
13 of this, and that's the Indemnity Agreement
14 itself.

15 Let's assume that indemnity was not pled.
16 Obviously, we think it is. That it need not have
17 been pled. We think it should have been. Does
18 this indemnity provision apply to their request
19 for indemnity, the entire Impact Group?

20 I submit to you the answer is no, that
21 under Texas Indemnity Law, an indemnity provision
22 does not apply between the indemnitee and the
23 indemnitor unless the agreement so states
24 expressly and unequivocally, no such language
25 exists in this Indemnity Agreement.

1 What we have on the Screen is a little
2 hard to read, the size of the font, is the entire
3 Indemnity Agreement.

4 What we've done is we've split the top
5 and the bottom part of the Agreement so it's
6 easier for old eyes to read, talking about my
7 eyes, not the Court's.

8 THE COURT: Thank you. Nice try,
9 Mr. Roberson.

10 MR. ROBERSON: Your Honor, this is
11 accorded notes, and I'll point to it on the
12 Screen, the upper left-hand corner of the
13 Indemnity Agreement, Page 4, clearly part of the
14 Letter Agreement. They're all one in the same
15 Agreement.

16 Let's look at the terms of the Indemnity
17 Agreement. What does the Indemnity Agreement
18 cover?

19 It clearly covers against "any losses,
20 claims, damages, liabilities, joint or several
21 that arise" -- I'm reading, obviously, the
22 highlighted language -- "in connection with its
23 services arising out of its engagement hereunder."
24 It's obviously referring to the indemnity.

25 And then toward the bottom, the

1 limitation is: "Provided, however, the company
2 will not be liable to the indemnified party
3 hereunder to the extent any damages are found in a
4 final nonappealable judgment by a court of
5 competent jurisdiction to have resulted from a
6 gross negligence, bad faith or willful misconduct
7 of the indemnified party seeking indemnification
8 hereunder."

9 If you stop right there and you didn't
10 read any further, you could make an argument, I
11 don't think a very good argument, but you could
12 make an argument that maybe this is broad enough
13 to cover an indemnity versus indemnitor,
14 indemnitor versus indemnitee claim.

15 Nowhere in here does it say it does that.
16 It's not expressed, it's not unequivocal, and
17 there are cases that we cite where it is expressed
18 unequivocal, so what we have to do is we have to
19 go to the four corners of the document. Let's
20 look at the bottom half of the Indemnity
21 Agreement.

22 The bottom half of the Indemnity
23 Agreement there's several indicia that courts have
24 looked at to determine whether it covers a claim
25 by Indemnitee against an Indemnitor in its own

1 claim as opposed to a claim by a third party.

2 The first is receipt by the --
3 immediately upon or promptly after receipt by the
4 indemnified party of notice of any claim
5 indemnified party has to notify the company.

6 That clearly contemplates a third party
7 making claim against the Indemnatee and the
8 Indemnatee then going and notifying the company.

9 All right. The second indicia of a third
10 party Indemnity Agreement is that the company
11 Dorado has the right to assume the defense of such
12 claim.

13 Well, if this covered claims by Dorado
14 against Impact, you would have the nonsensical
15 result under this Indemnity Agreement of Dorado
16 assuming defense of its own claim. Clearly not
17 what's contemplated by the Agreement.

18 This is talking -- clearly implying a
19 claim by a third party against the indemnitee and
20 the indemnitee then turning to Dorado for a
21 defense, not the situation you're hearing today
22 which is when Dorado makes a claim against Impact,
23 Impact has to turn around and tender the defense
24 of that claim to Dorado. It would be circular.

25 The third element is the cooperation with

1 the company and the company's counsel in defense
2 of such action.

3 Again, I think it's pretty nonsensical
4 because it would have the Plaintiff and Defendant
5 cooperating with each other in the defense of the
6 lawsuit.

7 Again, I think what this tells us is that
8 this is a third party type of Indemnity Agreement.

9 The last thing, and it's not part of this
10 is -- and I think it's instructive -- several
11 of the cases we cite when the Court's are trying
12 to figure out whether it applies to an indemnitor
13 versus and indemnitee claim or a indemnitee versus
14 indemnitor, they look to see whether or not one of
15 the indemnified actions is a breach of a covenant
16 of the Agreement itself.

17 So, if the indemnity says: "I, the
18 Indemnitor agree and indemnify you the Indemnitee
19 from any breach of covenants 2, 6, 12" and those
20 happen to be affirmative covenants of the
21 indemnitor, the Courts says that tells the Court
22 that it was the intent of the Indemnitor to
23 indemnify the Indemnity for the Indemnitor's
24 breach of those covenants. We don't have any of
25 that here.

1 So, I think the five elements or the five
2 indications that I see from this Agreement are
3 that it does not apply to a claim by Dorado
4 against the Indemnity.

5 Now, what we have here, the Court has
6 obviously picked up on it, is the anomalous
7 situation where the Indemnitee has taken a
8 Judgment against the Indemnitor for breach of
9 contract, approximately \$1.3 million and is taking
10 the position that it should be indemnified by the
11 Indemnitor from the Judgment it took against the
12 Indemnitor.

13 It's almost mind-numbing to think about
14 that, but I don't know how -- indemnities run to
15 claims against the Indemnitee. When the
16 Indemnitee took a Judgment against the Indemnitor,
17 that's not a claim against the Indemnitee. I just
18 don't see any way you can read this Agreement to
19 say that.

20 In sum, I think this Indemnity provision
21 not cover the Impact Group's claim arising from
22 Dorado's Judgment against Impact Group, the
23 Impact's Judgment against Dorado, or any of the
24 attorneys' fees that are subsumed in the trial of
25 those various actions which I'm going to talk

1 about now.

2 Let me show you a -- Your Honor,
3 Mr. Culp is reminding me that one of the
4 provisions of the Indemnity Agreement, and it's in
5 the first paragraph, is a limitation on the
6 ability of the Indemnatee to seek recovery if
7 there's been bad faith or willful misconduct.

8 You recall, I showed you the two counts
9 from the Jury Charge where the Jury found that
10 there was an intentional misappropriation of a
11 trade secret and with unclean hands. I think that
12 -- they didn't use the term "bad faith" although,
13 I think we cited a Texas case that says unclean
14 hands is another way to define want of good faith,
15 so I think it is bad faith. For that reason as
16 well, I don't think this Agreement applies.

17 The last thing I would say, and it does
18 raise the issue of Mr. Schmidt's Affidavit. We
19 provided an Affidavit for Mr. Schmidt who tells us
20 that the matters in Panola County and in the U.S.
21 Investigation here in the Northern District did
22 not involve services under this Agreement. This
23 Agreement which had been terminated for some time
24 prior to those investigations dealt with --

25 THE COURT: I'm sorry, start this again

1 because I was looking at something else that I
2 want to ask you about, and I missed the predicate.

3 MR. ROBERSON: Okay. The predicate, Your
4 Honor, is in the middle of the Screen.

5 In order to recover, the Indemnatee's
6 claim has to be based on actions taken in
7 connection -- the claim has to be in connection
8 with its services or arising out of its engagement
9 hereunder. "Hereunder" obviously is the Letter
10 Agreement.

11 THE COURT: Right.

12 MR. ROBERSON: Mr. Schmidt's Affidavit
13 which is attached to our Response says that what
14 the Letter Agreement provided for was investment
15 banking services. The investment banking services
16 in this contract had ended prior to Panola County
17 investigation which the evidence shows began
18 sometime in October of 2007, that the Panola
19 County investigation dealt with the nonpayment of
20 some Mechanic's and Materialman's creditors which
21 I think this Court's already heard about in the
22 main case, and that the payment or nonpayment of
23 those parties deals with the accounting records of
24 the Debtor, and the parties seeking indemnity here
25 have no involvement or responsibility in the

1 bookkeeping accounting records.

2 And lastly, Mr. Schmidt --

3 THE COURT: So, why were they
4 participating in that investigation?

5 MR. ROBERSON: I have a theory, Your
6 Honor, that I'll save until we complete discovery.
7 I don't know. They were subject to subpoenas, I
8 don't know why they were subpoenaed.

9 THE COURT: What's the status of that
10 investigation?

11 MR. ROBERSON: The Panola County Grand
12 Jury is expired with no action. The U.S. Grand
13 Jury, I don't know whether it's expired or not,
14 but the last contact with Dorado was well over a
15 year ago, year and a half, or year and three
16 months ago.

17 But, Your HOnor, for those reasons, it
18 doesn't arise out of services under this
19 Agreement. The fact that this is a three-way
20 Indemnity Agreement, not a two-way, I don't think
21 the Indemnity Agreement applies. Forget whether
22 it was pled, whether it should have been pled,
23 whether it was compulsory or not compulsory, if
24 they were walking in here fresh off the street
25 making this indemnity claim based on this

1 Indemnity Agreement, I don't think there's
2 indemnity provided for under this Indemnity
3 Agreement because it clearly contemplates a third-
4 party claim against the Impact Group to be brought
5 to the attention of Dorado for defense cooperation
6 and ultimate payment.

7 THE COURT: Let me ask you a question
8 about the exclusion of willful misconduct, bad
9 faith, whatever else the third one was.

10 MR. ROBERSON: Gross negligence.

11 THE COURT: Thank you. It's the Jury --
12 it's in your Summaries, Question Number 4 to the
13 Jury, the misappropriation of trade secret
14 question.

15 MR. ROBERSON: Yes, Your Honor.

16 THE COURT: Did you cite cases -- I at
17 least missed them if you did -- that say that
18 willful misconduct or that misappropriation of
19 trade secret is an intentional tort (sic) of
20 willful misconduct in Texas? We found lots of
21 cases in lots of other jurisdiction where
22 misappropriation of a trade secret is an
23 intentional tort, but at least quickly in looking
24 at it, we did not find anything in Texas that
25 defined it as an intentional tort.

1 MR. ROBERSON: Your Honor, I can't recall
2 whether we did or not. If we didn't and the Court
3 wants briefing on that, obviously, we're happy to
4 provide it.

5 THE COURT: Well, I take it you would
6 agree with me for there to be willfulness, it
7 would likely have to be an intentional tort if it
8 is misappropriation of a trade secret that you're
9 arguing is the basis for the exclusion of
10 indemnification, then at least with respect to the
11 willful misconduct piece, it would likely have
12 been an intentional tort?

13 MR. ROBERSON: I agree, Your Honor. I
14 would also add, and you can see the definition of
15 trade secret misappropriation given to the Jury,
16 the third portion of it was "unauthorized use of
17 the trade secrets." I don't think it's an
18 accidental misappropriation or an unintentional
19 misappropriation, it's an intentional unauthorized
20 act, so if the Court -- and I'm happy to look
21 and see, we may have cited it, I just don't recall
22 it as I'm standing here.

23 THE COURT: All right. Second question
24 is, with respect to the second element, the trade
25 secret was acquired one of three ways: Through a

1 confidential relationship, under a contractual
2 obligation not to disclose it, or through improper
3 means.

4 Which one of those was applicable here,
5 or all?

6 MR. ROBERSON: Your Honor, I don't know.
7 I mean, I'm just reading the Charge. I don't know
8 that the Charge -- the Charge essentially says,
9 "If you find one of the three, answer yes." I
10 don't know whether they found it was a
11 confidential relationship, whether it was pursuant
12 to a contract, or through improper means. I don't
13 know.

14 THE COURT: Well, and the reason --
15 yeah, and I can't tell either, and I'll explain
16 why it's important to me, or at least I'm thinking
17 it's important, tell me if you disagree.

18 When we go down to what a confidential
19 relationship is, I come back to it's possible that
20 this could be the bad faith the exclusion would
21 talk about, but I can't tell what the Jury
22 answered "yes" for, so I don't know whether the
23 exclusion necessarily -- and nobody should take
24 anything I say here today too seriously. I do not
25 have a decision in mind with respect to this

1 matter yet, so if I state my questions as
2 definitive statements, they aren't. They're
3 intended to show that I at least spent time
4 thinking about this and have questions.

5 But it defines "confidential
6 relationship" as what it says, and then it goes on
7 in the second sentence: "The relationship is
8 based upon fair dealing and good faith."

9 Obviously, if you breach that implicit in
10 it's based upon fair dealing and good faith is
11 that you acted in bad faith.

12 But the way I read this, I can't tell
13 which of those are applicable, so for example,
14 unless the Jury believe that the trade secret was
15 acquired through a confidential relationship, it's
16 not necessarily true that then we'd have a bad
17 faith finding that I would need in order to apply
18 the exclusion. Do you agree with that --

19 MR. ROBERSON: Well, I guess --

20 THE COURT: -- at least based upon this?

21 MR. ROBERSON: I think for the bad faith
22 portion of it, I would probably agree, but to the
23 extent somebody misappropriates a trade secret,
24 that's willful misconduct. Whether it's in bad
25 faith or not, it's willful.

1 THE COURT: I hear you, but it would --
2 I was surprised not to be able to quickly find a
3 decision in Texas that told me whether
4 misappropriation of a trade secret was an
5 intentional tort or not.

6 And, again, we didn't spend an enormous
7 amount of time looking, but nothing quickly popped
8 up.

9 MR. ROBERSON: Your Honor, when I sit
10 down here in a moment and let Mr. Hail speak, I
11 will look at the Jury Charge which is the only
12 evidence I think we've got before us and see if
13 there's any other questions that assist us, but
14 I'm in agreement with you --

15 THE COURT: Well, the two I found were
16 the two that you've argued, this one and then the
17 Quanamero (phonetically spelled) defense.

18 MR. ROBERSON: Your Honor, again, I would
19 take us back to -- go back to the
20 indemnification provision.

21 Your Honor, as I read this, the finding
22 of bad faith or willful misconduct finding would
23 bar recovery, assuming the indemnification sounded
24 in the first place (sic). I don't it sounds in
25 the first place because its a claim by the

1 Indemnatee against the Indemnitor.

2 If there is a finding of bad faith or
3 willful misconduct, then I think it's just --
4 it's surplus because I don't think it really
5 matters here because I don't think it's a
6 two-party Indemnity Agreement.

7 Your Honor, let me proceed to a Chart
8 that we put together, Exhibit No. 13. Recall back
9 to our Motion to Compel hearing, maybe too much of
10 a box drawer -- we tried to figure out how to get
11 all these claims in brackets so we could try them.

12 What this Chart does is it takes each
13 element of the Amended Proof of Claim and puts
14 them into a box and puts those boxes below the
15 Judgment, portion of the Final Judgment that I
16 believe they apply to.

17 So, let me give the Court an example.

18 In the lower left-hand corner of this
19 Exhibit, or this demonstrative, you see contract
20 damages of \$776,000 with the red number 1 in
21 there. They go to Slide 3.

22 THE COURT: Right. You've matched it up
23 to the Amended Proof of Claim?

24 MR. ROBERSON: I have, Your Honor.

25 Let me go back to Slide 13, please.

1 Your Honor, so as not to drag the Court
2 through that exercise, you can see that I've
3 populated every box on this Exhibit with a number
4 that corresponds to the Amended Proof of Claim and
5 my interpretation directly from the language of
6 the Amended Proof of Claim to the portion of the
7 Final Judgment it relates to.

8 Now, there are attorneys' fees that are
9 included in the Amended Proof of Claim that are
10 not expressly provided for in the Judgment.

11 I recall Mr. Spector's term which I liked
12 which is "subsumed within the Final Judgment."
13 The issue is what -- which portion of those
14 attorneys' fees are expressly provided for in the
15 Judgment are subsumed in the Judgment by
16 applicable documents res judicata under Rooker-
17 Feldman.

18 In the center of this Exhibit 13 you'll
19 see a box denominated "attorneys' fees" and it has
20 the Numbers 5, 17, 20 and 21.

21 THE COURT: Right.

22 MR. ROBERSON: Those numbers correspond
23 again to boxes within the Amended Proof of Claim.

24 Let me go to the next Exhibit where we
25 talk about just these attorneys' fees.

1 Before I do that, let me go back to the
2 prior Exhibit.

3 Your Honor, excluding these attorneys'
4 fees in the center box for a moment, as I've said,
5 I believe that Rooker-Feldman applies to the
6 relitigation of everything that was litigated in
7 State Court. I believe that the theories that
8 we've discussed here, vis-a-vis indemnity equally
9 apply, and even under an indemnity theory,
10 everything that's included in the box, "Judgment
11 versus Dorado" and the boxes below it, and the box
12 "Judgment versus Impact, et al" and the boxes
13 below it, this Court has no choice but to refrain
14 from litigating.

15 Let's talk about the attorneys' fees for
16 a second.

17 THE COURT: But it's not clear -- well
18 -- it's not clear to me they want me to
19 relitigate those. In fact, I don't think they do,
20 I just think they want me to recognize their claim
21 for those amounts here based upon the Judgment
22 entered by the State Court.

23 Now, --

24 MR. ROBERSON: I agree with you, but I
25 what I think I heard Mr. Spector say was, if the

1 Court of Appeals reverses, we still have the right
2 to come over here to seek indemnity. I don't know
3 how you do that. For example, Box No. 1 down
4 there which is "Contract Damages", once the Court
5 of Appeals has litigated that matter, I don't
6 think this Court can relitigate it under any
7 theory.

8 THE COURT: Well, but I have even a more
9 practical problem which is, we're going to trial
10 probably a whole lot quicker than the State Court
11 Appellate Judge is going to give us a ruling --

12 MR. ROBERSON: Yes, Your Honor, and I
13 heard --

14 THE COURT: -- because I'm not going to
15 wait to see what the State Court Judge does before
16 we go to trial here, and so there you go. I mean,
17 I don't think we even come back to -- I don't
18 know how I view what they're asking for, if that's
19 really what they're asking for because it is not
20 my intention to await State Court Judgment
21 becoming final in the sense that it has exhausted
22 all appeals so that Impact can say, "Well, we got
23 a buck 95 as contract damages, but we really think
24 the Judge goofed up, and so we want another 700 or
25 800,000 instead of the buck 95 under our indemnity

1 theory."

2 I am -- at least at the moment, I don't
3 know how I do that.

4 MR. ROBERSON: Your Honor, I don't know
5 how you do that either, and I would overlay that
6 analysis you just made with the fact that this is
7 not the typical situation where the Debtor -- the
8 Judgment's taken against the Debtor and they file,
9 and the Judgment is effectively superceded because
10 of the Automatic Stay.

11 Here we put up \$1.3 million of cash and
12 transferred 5 percent of the stock.

13 THE COURT: No, which was my point
14 earlier as to: Why are you seeking indemnity when
15 you've got a Judgment that has been fully
16 superseded? Good luck on appeal. If you win, go
17 get paid. That's why it got superseded.

18 MR. ROBERSON: Right. I agree, Your
19 Honor.

20 THE COURT: Please.

21 MR. ROBERSON: Thank you, Your Honor.
22 Let me go to the last slide. On this slide, what
23 I attempt to do is take the four elements of
24 attorneys' fees that aren't expressly addressed in
25 the Final Judgment.

1 THE COURT: All right. So, the second
2 slide just takes the middle box from the prior
3 one?

4 MR. ROBERSON: Yes, Your Honor, it does.

5 THE COURT: All right.

6 MR. ROBERSON: And if we could get our
7 whiz-bang to work, we would have shown it coming
8 out of there, but we couldn't, so we have a second
9 slide.

10 The second slide just takes the middle
11 box, the attorneys' fees box and breaks it down
12 into an analysis that I think the law directs us
13 to, and that is that you have to look at the
14 attorneys' fees that are discussed, referenced in
15 the four elements of their Proof of Claim in light
16 of when they were incurred and what did they
17 relate to.

18 So, let me start with No. 17.

19 No. 17 off of Exhibit No. 3.

20 THE COURT: That's the postpetition fees
21 that they claim that they've incurred here in the
22 bankruptcy case?

23 MR. ROBERSON: Correct, and as you'll see
24 there, they say, "It may be augmented for
25 collections costs."

1 Texas law says that if you want to
2 recover fees for the cost of appeal or the cost to
3 collect your Judgment, you're entitled to ask for
4 it --

5 THE COURT: You ask for those at trial.

6 MR. ROBERSON: -- you're entitled to ask
7 for it; if you don't ask for it, you don't get it.
8 If you do ask for it, you get whatever you're
9 awarded and that's all you get.

10 I don't know how Box No. 17 can be
11 anything other than an attempt to collect on the
12 claim, the Judgment in the Bankruptcy Court, so if
13 it's not covered by the Judgment, if they didn't
14 get that within their Judgment, I think they're
15 barred by Rooker-Feldman from coming to this Court
16 and asking this Court to relitigate whether
17 they're entitled to attorneys' fees for collection
18 on the underlying Judgment.

19 THE COURT: So, Impact is just an
20 unsecured creditor in the case?

21 MR. ROBERSON: It is an unsecured
22 creditor in the case with whatever you call the
23 rights --

24 THE COURT: Well, now with a superseded
25 --

1 MR. ROBERSON: With a superseded
2 Judgment, and 800,000 earmarked pending the
3 outcome of this litigation.

4 THE COURT: Well, but they don't have
5 lien in the 800,000.

6 MR. ROBERSON: No.

7 THE COURT: I mean, that was just posted
8 as security to ensure that their claim could be
9 paid if it were allowed.

10 MR. ROBERSON: Yes, pursuant to the
11 Court's Order. So, again, if it's collection, and
12 I can't imagine what else it would be in a
13 bankruptcy proceeding, Texas law tells us you
14 needed to get it in your Judgment. If you did,
15 great; if you didn't --

16 THE COURT: But how could they get it in
17 their Judgment? They didn't know you were going
18 to file bankruptcy.

19 MR. ROBERSON: But no Judgment creditor
20 ever knows what efforts they're going to have to
21 go through to collect. That's why the cases say,
22 "You can ask for it, and if you're awarded it, you
23 get it." If you don't ask for it or you ask for
24 too little, the cases say, "You can't come back
25 and ask for more."

1 You get effectively one bite at the apple
2 under Texas law.

3 THE COURT: And have you cited me case
4 law to that effect in your brief?

5 MR. ROBERSON: Yes.

6 THE COURT: All right.

7 MR. ROBERSON: Your Honor, with respect
8 to Item 17 of the Amended Proof of Claim, we
9 believe that is barred by both Rooker-Feldman and
10 res judicata in its entirety because it's a
11 collection cost.

12 THE COURT: I'm not sure what it is.

13 MR. ROBERSON: Well, --

14 THE COURT: I mean, I read what it says
15 on the Proof of Claim, that it was attorneys' fees
16 billed -- are these the segregated -- I recall
17 from a prior hearing Mr. Hail telling me that they
18 had to segregate their fees into recoverable which
19 is nonrecoverable in the underlying action.

20 MR. ROBERSON: That's a mistake or
21 lawsuit.

22 THE COURT: Right, right.

23 MR. ROBERSON: This is solely post-Dorado
24 bankruptcy proceeding which would have been --

25 THE COURT: But 734? No, no, no.

1 MR. ROBERSON: No, Your Honor, we're in
2 No. 17. I'm going to get to 734 here in just a
3 moment.

4 THE COURT: Okay. Sorry. No, 17, I
5 know. That's the 30,000 of postpetition.

6 MR. ROBERSON: Correct.

7 THE COURT: Understand.

8 MR. ROBERSON: I think that's collection
9 costs.

10 THE COURT: I heard you on that.

11 MR. ROBERSON: Okay.

12 THE COURT: I'm sorry.

13 MR. ROBERSON: That's all right. Let me
14 move to 20 and 21, and then I'm going to wrap up
15 with 5.

16 THE COURT: Okay.

17 MR. ROBERSON: 20 and 21, as the Court
18 saw earlier, are the claims of Mr. Heyn and
19 Mr. Calce. And if we look at the Amended Proof of
20 Claim, the Chart that's before the Court, 20 and
21 21 owe about \$36,000, and they assert here that
22 they're subject to indemnification which is a
23 slight change from their original Proof of Claim.

24 But let's go to Exhibit B which is part
25 of their Proof of Claim and see what they say in

1 their Proof of Claim about these fees.

2 The Court will look in the middle,
3 Mr. Heyn says that he submitted \$21,354.28 of
4 those fees at trial.

5 If they've been submitted at trial, he
6 either got them or he didn't get them, and like
7 the collection costs we were just talking about,
8 or actually any attorneys' fees, you either get
9 them or you don't get them, and if you don't get
10 them from the Judge in the trial court, you're not
11 getting them from a subsequent proceeding such as
12 this proceeding.

13 So, I think for Mr. Heyn, his Proof of
14 Claim I believe is Item 20 or 21, I don't have
15 that before me, whichever --

16 THE COURT: His is 21.

17 MR. ROBERSON: 21, has to be reduced or
18 disallowed, except to the extent of the \$6,776.30
19 that's not highlighted, and that is, and you can
20 see this is his exhibit, his words, not mine,
21 submitted at trial in Panola County since the end
22 of trial.

23 Clearly, what we'll have to do is we'll
24 have to take discovery on how the Panola County
25 portion and the since the end of trial portion

1 came about, and we'll do that when we come back
2 here in June, but as to the 21,354.28, I think
3 he's made it official that it's already been
4 submitted and it's part of the original Judgment,
5 or it's not part of the original Judgment, but if
6 it's not, he's barred by the applicable Texas law,
7 and that portion of his Proof of Claim should be
8 disallowed.

9 THE COURT: And what is this from?

10 MR. ROBERSON: This is Exhibit B to all
11 three of the Proofs of Claim filed by Impact, Heyn
12 and Mr. Calce.

13 THE COURT: Okay.

14 MR. ROBERSON: Your Honor, the same
15 argument with respect to Mr. Calce. Bottom part
16 of the exhibit before the Court shows that
17 Mr. Calce submitted \$5,000 at trial. For the same
18 reasons that I just articulated with respect to
19 Mr. Heyn's Proof of Claim, I think that
20 Mr. Calce's Proof of Claim should be reduced by
21 \$5,000 or disallowed, except to the extent of
22 \$610.72 which we will try in June.

23 All right, Your Honor. Let's go to
24 Number 5.

25 Item 5 is the category that was

1 originally A-5 that we talked about during the
2 original Status Conference. As the Court can see,
3 there's \$275,000 that was awarded as part of the
4 Final Judgment, and it's set forth in Item No. 3,
5 so we reduced the 734 by at least 275,000 because
6 it's part of the Final Judgment.

7 There's testimony --

8 THE COURT: So, you agree with me that
9 this 734 was the trial -- that was the fees
10 incurred in litigating in the State Court action.
11 Is that what you understand that to be?

12 MR. ROBERSON: That's what I understand
13 it to be. I will honestly reply to the Court that
14 I have looked at the support for that, and it is
15 made up of all kinds of invoices, some of which I
16 can't tell what they are, but they are all legal
17 fees, legal fees and costs. The overwhelming
18 majority of them appear to be related to the
19 trial.

20 THE COURT: All right. So, you think 275
21 is a clear duplicate?

22 MR. ROBERSON: Clear -- 275's a clear
23 duplicate. The testimony of Mr. Hail which was
24 attached to their Response, he's asked about what
25 fees his firm's incurred during the trial at the

1 end of the trial. On his attorneys' fees portion,
2 he testifies 463,000 of fees have been incurred by
3 his firm, so I think you've got Plaintiff's
4 counsel admitting that at least 463 is a
5 duplicate, but Your Honor, I think it's broader
6 than that.

7 Let's go back to last line 14.

8 Your Honor, I think it really breaks down
9 to were the fees incurred before submission to the
10 Jury, and if they were incurred before submission
11 to the Jury, you either present them to the trial
12 court and get a Judgment on them, or you don't.

13 If you don't, Texas law tells us that you
14 can't seek recovery of those fees later from out
15 of the trial court or another court based on Texas
16 law in the concept of res judicata. The Court
17 says you can get appellate fees, you can get
18 collection fees, you can get fees in the
19 underlying trial, but you get one bite at that
20 apple, and that's in the trial court, and you
21 can't come back later and relitigate that.

22 So, in my opinion, everything that was
23 incurred before submission to the Jury is buried
24 in Box 5 has to be disallowed. The evidence that
25 we have which is an Exhibit B which I'll go back

1 to here in a moment. In fact, let's go back there
2 right now.

3 Your Honor, this is the only evidence
4 that we have other than representation by counsel
5 at the hearing. This indicates that in Panola
6 County, Impact -- you see Impact on the top
7 line. This is all of Impact's fees: \$734,000,
8 and then there's a subcategory Panola County costs
9 "included in above", and it totals about 52,000.

10 The evidence that we have before the
11 Court is that Panola County, the subpoena was
12 issued just prior to the commencement of the State
13 Court trial. If we're -- in the abundance of
14 caution, if we assume everything in Panola County
15 happened after the trial, then we would carve that
16 out of the -- of A-5 and try it in June.

17 We are not today seeking a Summary
18 Judgment on the portions of this exhibit that
19 relate to Panola County or are shown here to be
20 incurred since the end of trial. I can't tell
21 when those were incurred. I don't know whether
22 they implicate the Indemnity Agreement or not, but
23 giving them the benefit of the doubt, they could
24 have occurred after trial.

25 Everything that occurred before trial I

1 think is -- I think they've got what they've got
2 and they don't get to relitigate it in front of
3 this Court.

4 Your Honor, there is a place that we cite
5 -- actually, we cite two cases. One of them I
6 think is very instructive on the legal fees issue.
7 It's Super versus AGS. It's a New York Court of
8 Appeals case.

9 There the claim that was sought was
10 solely attorneys' fees of the Indemnatee, and the
11 Court looked at the Indemnity Agreement and
12 concluded that the Indemnity for fees analysis was
13 just like the analysis for indemnity for damages;
14 that is, that is the Indemnity Agreement didn't
15 sound for a two-party indemnity claim for damages,
16 it didn't sound for a two-party indemnity claim
17 for fees.

18 I think the same legal theories apply
19 with respect to all of the attorneys' fees here.
20 If they are being sought for purposes of
21 indemnity, I think indemnity has been excluded for
22 the reasons I outlined a moment ago.

23 Your Honor, with respect to the cross-
24 motion --

25 THE COURT: So, -- let me ask you a

1 question before you move to the cross-motion.

2 So, from your perspective, if I'm --
3 what do you believe, if I granted your Motion,
4 what's left at trial?

5 MR. ROBERSON: Whatever fees were
6 incurred after submission to the Jury that relate
7 to the State and Federal investigations.

8 Let me explain the box that you're
9 looking at.

10 You can see that we have incurred after
11 submission, we have three boxes.

12 Appellate fees, it's clear that you can
13 have appellate fees after submission to the Jury.
14 I think that's self-evident, but again, I think
15 Texas law says those relate back to the trial and
16 you get whatever the Court awarded you, so if you
17 presented evidence that your appellate fees are
18 50,000 and you spent 500,000, that 450,000 is the
19 Complainant's problem.

20 Collection fees, for the reasons I just
21 said, I don't think they're recoverable. The only
22 evidence we have of any fees that were not
23 incurred before submission are the State and
24 Federal investigation.

25 THE COURT: So, the far right box is the

1 only thing that you think is left for trial if
2 your Motion is granted.

3 MR. ROBERSON: Yes, Your Honor. And,
4 again, Exhibit B gives us some indication of the
5 amount of those fees, somewhere on the order of 58
6 to \$80,000.

7 Your Honor, briefly in response to the
8 Cross-Motion for Summary Judgment, I can either
9 argue that now or let Mr. Hail argue, however you
10 wish.

11 THE COURT: Mr. Hail, do you have a
12 preference.

13 MR. HAIL: I don't have any problem --

14 THE COURT: All right. Please.

15 MR. ROBERSON: Thank you, Mr. Hail.

16 Your Honor, with respect to the Cross-
17 Motion for Summary Judgment, I would point out
18 that there is no evidence of the reasonableness or
19 the necessity of any of the fees based on an
20 indemnity claim.

21 The Impact Group asserts on the one hand
22 that indemnity is a new separate distinct cause of
23 action while on the other hand says that their
24 proof of attorneys' fees on the old cause of
25 action are sufficient to prove up attorneys' fees

1 on the new. I don't know how you can reconcile
2 those two. I think you're seeking indemnity and
3 you're seeking attorneys' fees on the same
4 indemnity claim, I think you got to prove up the
5 reasonableness and necessity of those claims, and
6 there's no evidence of the reasonableness and
7 necessity of these fees.

8 There is evidence, as I indicated in the
9 form of Mr. Schmidt's Affidavit, that the fees
10 incurred with respect to Panola County in the
11 Federal Grand Jury Investigation do not belate
12 (sic) the services under the Agreement.

13 Thirdly, if some of the fees are subject
14 to indemnity, it's difficult to tell what they
15 are, whether they relate to Panola County or
16 submitted subsequent to trial, and that's why in
17 the abundance of caution, we've said "anything
18 incurred after submission."

19 Lastly, I would reiterate that the
20 indemnity provisions don't apply to causes of
21 action between the indemnity claimants, causes of
22 action between Dorado and the Indemnity claimants,
23 or to their legal fees.

24 For those reasons, Your Honor, I would
25 respectfully request the Court grant Dorado's

1 Motion for Summary Judgment on the basis of
2 Rooker-Feldman, res judicata, Texas law and
3 disallow or refrain from relitigating all of the
4 counts of the Amended Proof of Claim, 1 through
5 21, except for the small portions of 20 and 21
6 which I discussed a moment ago and those fees
7 related to the State and Federal Investigation
8 which are included in Item No. 5.

9 THE COURT: Very well.

10 MR. ROBERSON: Thank you, Your Honor.

11 THE COURT: Thank you. Why don't we take
12 a five-minute recess and then we'll come back and
13 hear a response.

14 (SHORT RECESS)

15 COURT CLERK: All rise.

16 THE COURT: Be seated, please. All right.
17 Mr. Hail.

18 MR. HAIL: Yes, thank you, Your Honor.

19 THE COURT: Please.

20 MR. HAIL: Your Honor, I'm going to try
21 not to be duplicative of some of the background
22 information --

23 THE COURT: All right.

24 MR. HAIL: -- that counsel went into, but
25 I'm going to see if I can just rephrase it a

1 little bit differently.

2 THE COURT: Please.

3 MR. HAIL: It's hard to follow sometimes
4 all of his buckets, so you know, I have different
5 buckets in my mind, we certainly think differently
6 in some ways.

7 There are really three categories that
8 we're going to be talking about here today, at
9 least I will.

10 We got the criminal investigation issue
11 that's the Panola County and the Justice
12 Department issue;

13 We've got the unrecovered State Court
14 fees, and essentially the -- you know, the
15 non-segregated breach of contract of fees that
16 were testified to at trial;

17 And then we've got the State Court
18 Judgment, the Dorado Judgment against Impact and
19 the Impact people.

20 As I understand --

21 THE COURT: The Dorado Judgment against
22 Impact.

23 MR. HAIL: Yes, yes. Those are the three
24 primary things that I believe our respective
25 Motions deal with, and they certainly are broken

1 down into smaller subsets, but generally going to
2 be talking about it in those categories.

3 And they're moving for Summary Judgment
4 on Category B and C, the unrecovered State Court
5 fees, and then the Dorado Judgment.

6 THE COURT: Oh, but they're also --
7 they think you're asking for a fourth category,
8 and frankly, so do I based upon the colloquy at
9 the outset, and that is, you seek to be
10 indemnified for potential adverse outcome of an
11 appeal.

12 MR. HAIL: After discussing that with my
13 co-counsel and upon a little more reflection,
14 again, in understanding that, it may appear we're
15 doing that. I don't believe that's necessary
16 based upon certain of the Court's comments and
17 thinking through the fact it's superceded in that
18 type of issue, I'm certain the Court is not going
19 to go back and relitigate that issue. So, there
20 is not a fourth category for purposes of this
21 Summary Judgment.

22 THE COURT: All right. So, you're in
23 agreement that there is no indemnity claim for
24 your Judgment against Dorado?

25 MR. HAIL: Yes.

1 THE COURT: So, you're going to look to
2 the appellate process and the supersedeas bond
3 with respect to satisfaction of whatever rights
4 you have against Dorado as reflected in the
5 Judgment?

6 MR. HAIL: Yes, that's accurate.

7 THE COURT: All right.

8 MR. HAIL: Okay. So, with that, I think
9 hopefully that frames it up just a little bit.

10 First of all, with regard to the scope of
11 the indemnification, that's certainly very
12 important, and you know, I don't have it on the
13 Screen, I never read it even though the Screen
14 need to get bigger and bigger as time goes on for
15 all of us, I can tell you.

16 THE COURT: I just gave up and got
17 bifocals. Now I can read just fine again.

18 MR. HAIL: Well, I may need to borrow
19 those one of these days.

20 Anyway, what Your Honor clearly is going
21 to have to do is go back and carefully read the
22 Indemnification. Like anything with
23 indemnification agreements, you read it four times
24 and the fifth time something else jumps out.

25 The big picture observations I would say

1 is 1, the scope of it is very broad just as far as
2 the scope of all possible avenues, including what
3 we believe are not only third-party claims but
4 claims directly between the parties.

5 THE COURT: Do you agree, though, that
6 the general rule in Texas is that indemnity
7 provisions normally don't apply between the
8 parties to the indemnity, they generally are
9 designed to protect against third-party claims,
10 and at least Mr. Roberson has correctly cited a
11 number of decisions that characterize that as the
12 general rule, and that if you intend to protect
13 -- if the Indemnitor intends to protect the
14 Indemnity from claims against those two parties,
15 the Agreement should expressly state that?

16 MR. HAIL: I certainly agree with the
17 general proposition of, you know, we certainly
18 have cited case law and there's numerous case law
19 that that's not the exclusive situation, the
20 Court's going to have to assert -- again, sorry,
21 my Blackberry's off but I can't turn my wireless
22 off for it.

23 THE COURT: Okay. Fair enough.

24 MR. HAIL: Seems to interfere with the
25 system. So, generally, what the Court's certainly

1 is going to have to do is to carefully review the
2 language of indemnity, the scope of it, breadth of
3 it and see if it feels like it is broad enough to
4 include it.

5 With regard to the fact that there is a
6 reference to notice and defense in those types of
7 deals, we would just say, certainly -- it's
8 certainly contemplated -- there's no question I
9 believe it would apply to third-party claims as a
10 general concept --

11 THE COURT: Right.

12 MR. HAIL: -- and it strikes me that just
13 because there is a mechanism when dealing with
14 third-party claims like notice and those types of
15 deals, that would not be exclusive whatsoever of
16 the broad scope of picking up as an issue between
17 Dorado and Impact or Dorado and Calce or something
18 like that. Obviously, if it's a third-party
19 claim, Dorado's not going to be aware of it any
20 sort of way unless they are -- or they argue in
21 notice and maybe have some rights to protect
22 themselves and step in --

23 THE COURT: But under what circumstance
24 -- I mean, help me understand because why would
25 Impact need an indemnity for claims arising out of